UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICHTONE DESIGN GROUP LLC,

Plaintiff,

22 CV 1606(KMK)(AEK)

-vs-

DISCOVERY CONFERENCE

MARY SULLIVAN KELLY and TRUE PILATES BOSTON LLC,

Defendants.

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United States Courthouse
White Plains, New York

December 6, 2022

B e f o r e: THE HONORABLE ANDREW E. KRAUSE,
United States Magistrate Judge

APPEARANCES:

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Proceedings recorded via digital recording device

THE DEPUTY CLERK: Good morning, all. This is the matter of Richtone Design Group LLC versus Kelly, et al., Docket No. 22-cv-1606, the Honorable Andrew Krause presiding.

Counsel, please note your appearance for the record, starting with plaintiff's counsel.

MR. SALTA: Romeo Salta, of counsel to Knull P.C. Good morning, Judge.

THE COURT: Good morning, Mr. Salta.

MR. TROY: Good morning, Your Honor. Gordon Troy representing the defendants, and I have to make a note is, is please accept my apologies for giving you an extra "S" to your name in my earlier filings.

THE COURT: And dropping the "E," too.

MR. TROY: Yes, it was totally erroneous. Please accept my apologies.

THE COURT: Apology is accepted. That is a common misspelling of my name, so apology accepted. Thank you.

MR. TROY: It could be also because an "E" and an "S" on the screen look very similar to each other.

THE COURT: Okay. Well, whatever it is, it is a common misspelling, so all right. Now we know.

MR. TROY: It's a little embarrassing.

THE COURT: That's okay. There are worse things that have happened in the world, so but I appreciate it, Mr. Troy. All right.

We have a long agenda to go through today, and so I want to start off by making sure I have a clear understanding of exactly where things are in this case based on your last conference with Judge Karas. In the agenda filing that was submitted by Mr. Troy at ECF No. 44 there was a brief recap. I just want to make sure we are all on the same page about that.

At our last conference, of course, we talked at some length about the possibility of plaintiffs filing a motion to dismiss the defendants' third counterclaim, and just for the record to be clear, I am going to probably refer to you as "plaintiffs" and "defendants;" plaintiffs being Mr. Gallagher and Richtone, defendants being the defendants on the original complaint. I understand there are counterclaims, and Mr. Gallagher is not actually technically a plaintiff, but I think we will all understand who I am referring to, and just to make it a little bit less cumbersome, that's what we will do going forward.

There was going to be a motion to dismiss the third counterclaim. As part of the submissions back and forth about that, the defendants indicated an interest in filing a motion for summary judgment or partial summary judgment as to certain affirmative defenses, counterclaims, and at least one of the plaintiff's claims. There was back-and-forth about whether there should be a stay of discovery. Various orders were issued about that. I understand that Judge Karas held a pre-motion

conference last week on the 29th. In a minute entry of that conference, and then as reflected in Mr. Troy's letter on December 1st, the discovery stay, which was temporarily put in place at ECF No. 35, was lifted. We have then a deadline for completion of all discovery of January 31st, but there's been some discussion about potentially deferring the inspection of photographs and negatives, which we spent a lot of time talking about at our last conference, until after that discovery deadline and potentially until after the resolution of some of these motions.

So that's what I understand to be the current state of affairs based on my review of the docket and the various filings.

Mr. Salta, anything you want to just clarify for me or add to that summary?

MR. SALTA: Well, just maybe for purposes of clarification, it's not that the plaintiff is waiving his right to bring a motion to dismiss on standing grounds with regard to the third counterclaim; it's just that after our conference with Judge Karas, it was agreed -- Mr. Knull was present representing the plaintiff -- it was agreed that there would be one motion after discovery to address all the issues.

THE COURT: Okay. I didn't actually realize that. That wasn't clear. So that's new information. So motion practice is going to be deferred.

MR. SALTA: That's right. Judge Karas suggested we do that to maybe expedite things, and so it's not a waiver, in other words.

THE COURT: No. That's fine. I understand that. I think that was my suggestion, too, but --

MR. SALTA: Yeah. Fine.

THE COURT: Okay. So be it. Okay.

MR. TROY: And Your Honor, just to supplement that.

THE COURT: Yes.

MR. TROY: It was all fact discovery by January 31st and deferring what we call the expert, which is to be able to review the negatives that we had spent a copious amount of time last time we were together.

THE COURT: Okay. That is particularly germane to our discussion today. The original text order that Judge Karas issued on this didn't distinguish between fact and expert discovery in terms of the January 31st deadline, and I went back to the original scheduling order, which is at ECF No. 17, which had the same deadline for completion of fact and expert discovery, essentially. Actually, the fact discovery deadline was a couple of weeks later than the expert discovery deadline, which is unusual. But this is the type of schedule that is often put in place when the parties are not anticipating any expert discovery.

So as I understand the potential scope of expert

discovery here, we are likely to have expert discovery in connection with this inspection of the photographs and negatives. There had been some discussion at some point about maybe having some sort of legal expert on the Copyright Act of 1900 or whatever that exact statute was. Forgive me.

MR. TROY: 1909.

THE COURT: 1909. Thank you. But was there specific discussion with Judge Karas about the expert discovery and deferring that until after motion practice?

MR. TROY: Yes, Your Honor.

THE COURT: So.

MR. TROY: I'm sorry. If I may add to that, the discussion centered around that if we are successful, which I hope I am, in our motion practice, then there will be no need --

THE COURT: It obviates the need for the expert discovery. We do this all the time in other kinds of cases, personal injury cases and the like, where money can be saved if there's going to be summary judgment on some sort of liability issue with experts that mostly pertain to damages, that's fine. I just wanted to make sure that everybody has a common understanding of that.

Mr. Salta, that's your understanding as well?

MR. SALTA: That is my understanding. Well, I guess we will get to -- we'll get to the specifics when we get rolling on these objections of the defendants. It's our feeling that a

lot of the issues -- I don't know which would be better, to have the expert discovery ahead of time, which would obviate the need for burdensome discovery responses on our part? Because, quite frankly, a lot of these demands necessitate going through old negatives and having, I suppose, experts of our own trying to figure out how to respond to some of these demands. Old negatives, did you have this? Do you have that? I mean, the point is if they did the expert discovery, it would answer most of the questions that they have problems with in fact discovery, I believe.

THE COURT: How, though? I mean --

MR. SALTA: Well, a lot --

THE COURT: I mean, we will get into this I guess when we get into the details of some of the fact disputes, but if a question is: Did you receive this negative or photograph from a particular person at a particular time, how is an expert going to help figure that out?

MR. SALTA: Not that particular question.

THE COURT: Okay. Others.

MR. SALTA: Was this in your possession at the time, blah, blah, blah? What was in your possession? What was not in your possession at the time?

THE COURT: But how is that -- okay. When we get to those questions that you think can be better answered by an expert as opposed to by Mr. Gallagher or someone affiliated with

the plaintiffs, you can point those out to me, and then we can talk about what makes sense.

And obviously, Mr. Troy, if you have a different view of any of those things, you can share it at that time.

I am not exactly sure what you are talking about, Mr. Salta, but you will tell me when we get there.

MR. SALTA: Okay. Fair enough.

THE COURT: Okay. So before we leave today, let's make sure that we have an answer to this question about when expert discovery should take place. My understanding is, as of now, the schedule is all fact discovery to be completed by January 31st; expert discovery deferred until sometime after motion practice if it's still warranted. I gather Mr. Salta may have some ideas about how to do that differently. We will talk about that once we have a sense of what the discovery landscape is going to be.

All right. There are a couple of stray issues in order to sort of try to make some incremental progress before we dive into the more complicated ones. Let me just review those as I spotted them in the various filings.

There was some discussion about a deposition of a John Steel, who is a California resident, but who is going to be traveling to New York City this week. I believe this was something that you had raised in one of your letters, Mr. Troy?

MR. TROY: Your Honor, there -- that is still going

forward, but there is a slight change because there's sickness in his family, and he is not traveling to New York. So he has asked for a remote deposition. I've circulated to plaintiff's counsel yesterday, you know, the basic list of, you know, you know, the protocol, if you will, of how to conduct a remote deposition. We've already engaged a remote deposition company to be able to do that for us, and if you want me to go through that list, I don't have it printed out, but I --

THE COURT: No. I mean, unless --

MR. TROY: We have used it, this same list in numerous other cases.

THE COURT: Meaning just the mechanics of how you are going to go about it?

MR. TROY: Yes.

THE COURT: Sharing exhibits and whatnot?

MR. TROY: Yeah, we're going to share them on the screen; that the witnesses, they are not going to have any other props available, no other documents. Nobody is going to talk to the witness during the deposition.

THE COURT: Right. Is the witness going to be represented by counsel?

MR. TROY: No.

THE COURT: Okay. Fine. So that's going forward.

Mr. Salta, any concerns about that?

MR. SALTA: My only concern, and I spoke to Mr. Troy

briefly a few minutes ago, is whether or not Mr. Knull can be present for that, and -- he's going through some medical procedures right now.

THE COURT: Okay.

MR. SALTA: And I will let Mr. Troy know later today. I will try to reach Mr. Knull. It's -- what he is going through is a bit debilitating.

THE COURT: Okay. I'm sorry to hear that.

MR. SALTA: Yes.

THE COURT: And if Mr. Knull is not able to participate, are you able to participate?

MR. SALTA: I will try to be, but I know that it would be better if Mr. Knull is available, but if need be, I will participate.

THE COURT: Okay. I mean, the other thing is that if -- the whole point of conducting a deposition this week was that Mr. Steel was going to be here. If it's going to be taking place remotely, and there is some flexibility in Mr. Steel's schedule within the timeframe allowed by the discovery and potentially to accommodate Mr. Knull, then I will encourage you to work that out. I mean, again, the urgency to do it this week was it was an opportunity to catch Mr. Steel while he was in town. But in any event, I will leave you to discuss that. Obviously, it would be best if a representative from plaintiff's side could be present for the deposition.

MR. TROY: Absolutely, Your Honor. And all I can say is, is this that Mr. Steel basically said to us, that's the date that I blocked out for doing it, and let's just make that happen.

THE COURT: Right. This is a non-party witness. You want to be accommodating to his schedule. So --

MR. TROY: Overly accommodating.

THE COURT: Okay. Who is Mr. Steel, very briefly?

MR. TROY: Mr. Steel was the attorney who represented Clara Pilates in the original transaction from Clara Pilates to 939 Studio.

THE COURT: That's enough. That's okay.

MR. TROY: In 1970.

THE COURT: He has a connection to this case that dates way back.

MR. TROY: And he's old and frail.

THE COURT: Okay. Well, fine. So that's the status there. There was some discussion or some request in one of your submissions, Mr. Troy, about amending your answer to include a defense of collateral estoppel? I don't really want to get into that in great detail. It sounded like that was something you were going to address with Judge Karas. Was that discussed?

MR. TROY: We actually never got to that point with Judge Karas. My only concern -- I mean, we are of record that that's -- that if plaintiff goes down that path, that is a

defense, and we would amend the pleadings accordingly, but, you know, I think it's sufficiently of record at this point that I prefer not to file an amended answer and counterclaims.

THE COURT: Okay.

MR. TROY: Just seems like an unnecessary exercise on our part and on the plaintiff's part.

THE COURT: And plaintiffs seem to suggest it was an unnecessary exercise because, at least reading between the lines, it didn't sound like they were intending to raise any issues that would require that as a defense.

But, Mr. Salta, I trust that there is not going to be some argument down the line that if you raise whatever this argument is about trademark or about the --

MR. SALTA: Goodwill.

THE COURT: -- goodwill and how that may or may not apply in the copyright context, that the defendants are going to be precluded from raising a collateral estoppel defense because they haven't amended their answer?

MR. SALTA: The problem that we had with the whole collateral estoppel issue is these are different parties. It wasn't a copyright case.

THE COURT: That's a substantive problem that you have with --

MR. SALTA: Exactly. I mean, so --

THE COURT: I am just asking as a procedural matter.

MR. SALTA: Procedurally, if they want to put it as an affirmative defense that might not go anywhere, fine.

THE COURT: Or I think Mr. Troy would prefer to just not bother with that because if he has to amend his answer and counterclaim, then you have to file an amended -- just it creates work for everybody and expense.

MR. SALTA: We can work it out.

THE COURT: You are just not going to argue in the future that he is not allowed to say collateral estoppel.

MR. SALTA: Absolutely. Yeah, yeah. I see what you are saying. No. That's correct.

THE COURT: Okay. Fine. I think it makes sense to not spin our wheels --

MR. SALTA: Sure.

THE COURT: -- just to document that, especially since it's now well documented that if there were to be some argument along those lines, that the defendants may raise a collateral estoppel defense --

MR. SALTA: Fine.

THE COURT: -- you think that there is no collateral estoppel.

MR. SALTA: Also fine.

THE COURT: Everyone preserves their rights. Good.

I have a couple other loose ends on my list here. One had to do with information -- contact information for a witness

Wee Tai Hom. I hope I am pronouncing that correctly. That's W-E-E, new word, T-A-I, new word, H-O-M. Apparently, there was some indication at some point in communications about Rule 26 disclosures that this particular individual is alive and may be available for questioning. The defendants have asked for "accurate contact information" for -- is it Mr. Hom?

MR. TROY: Yes.

THE COURT: Mr. Hom, and as I understood it from the letter, which -- this is the point that wasn't specifically addressed anywhere else -- but as I understood it, certain contact information was provided, but it turned out not to be good contact information because Mr. Gallagher hasn't been in touch with this individual in some time. If this person is a potential witness, and somebody that the plaintiffs may rely on pursuant to Rule 26(a)(1), then obviously, they are obligated to provide accurate contact information to the extent they have it.

So did you provide the most current information that you have for this potential witness, Mr. Salta?

MR. SALTA: Yes, sir.

THE COURT: Okay. I mean, Mr. Troy, I think Mr. Salta acknowledges the obligation to provide that, and the rules are clear, but if he doesn't have anything more than what he's given you, then he can't conjure it. So I'm not sure what you are requesting exactly.

MR. TROY: I am not -- "conjure" is a perfect word,

Your Honor. My concern is very straightforward, and that is, is that part of the Rule 26 disclosures is to enable the opposite side to be able to decide who they may want to contact in connection with the litigation is is that my fear or concern is is that we go to trial, and the next thing you know, they are bringing in Mr. Hom because they've now engaged in some sort of due diligence to locate him, and I have not had an opportunity to depose him.

THE COURT: Right. But I mean, you could go engage in some sort of due diligence to locate him as well. I mean, this is a non-party witness. So if they have contact information, if the plaintiffs have his contact information, I am hereby directing you to provide the most up-to-date current contact information you have for this potential witness who you have listed as a potential witness in your Rule 26 disclosures if you have it.

MR. SALTA: Sure.

THE COURT: If you don't have it, then you don't have it. There is nothing more we can do about that. If it comes to be in your possession, then you have to supplement your Rule 26 disclosures accordingly as required by Rule 26(e). To the extent there is any ambiguity about everybody's obligations, it is now clear that that is required.

And again, Mr. Troy, you can try to find this person also.

MR. TROY: We have tried.

THE COURT: Okay. Fine. That's fine. So this happens, though, sometimes that there's a witness who people think will have relevant information, but no one knows where they are, and it is possible that he will be located at some point later on, and whatever remedies might be available at that point on the eve of trial will be discussed at that point if we get to that point.

Okay. So I think that covers the what I will call the odds-and-ends portion of this conference. Although, I will touch on this issue that has come to light recently with respect to the potential sealing of the document at ECF No. 36-1. First of all, I don't intend to rule on this issue today for a couple of reasons: One, the motion was filed last week by the plaintiff's side as directed. I did specifically say in my order scheduling that briefing -- that if the plaintiff felt the need to have a more expedited briefing schedule, they should request it, and frankly, I would have ordered that because if there was an urgency to potentially have this addressed right away, I would have taken that under advisement. But that was not requested, so the opposition to that motion was due on December 9th, Friday.

Now, Mr. Troy actually filed his opposition last night. I did have an opportunity to read it this morning, although just briefly, and so I'm prepared to discuss it a

little bit, but I am not planning to rule on that issue today.

A couple of things that came to mind as I reviewed the various papers on this issue: First, the plaintiff's motion, while it quotes from my individual practice rules, it quotes from the confidentiality order, it doesn't really engage in any detail what the legal standard for maintaining materials under seal and the presumption of public access that is afforded to those, to all materials, frankly, that are judicial documents and filed with the Court.

There are some leading cases on this matter. A couple of them are cited in Mr. Troy's submission. Another is a case called *Lugosch*, L-U-G-O-S-C-H, *versus Pyramid Company of Onondaga,* 435 F.3d 110, a Second Circuit case from 2006. That is the case most frequently cited on these issues, although I believe that Mr. Troy's brief cites some more recent Second Circuit law which relies on *Lugosch* for some of those standards. The main thrust of the plaintiff's argument seems to be that because these RFA responses were marked as confidential, that they should therefore be subject to filing under seal. First of all, there was no confidentiality order in place at the time that those responses were provided, so it's not even clear that they fall within the ambit of the protective order, but even if we were to set that aside and designate them as confidential pursuant to the protective order which is now in place, the law is quite clear that just because something is marked as

confidential pursuant to a protective order, even a protective order that has been so ordered by the Court, is not by itself a valid basis to overcome the presumption in favor of public access to judicial documents. There has to be something more than that. And in fact, in my confidentiality order, which governs in this case, it specifically says that there is no presumption that information marked as confidential pursuant to the protective order shall be filed with the Court under seal.

On top of that, there's an interesting sentence in one of plaintiff's letters in this case at ECF No. 32 where counsel wrote, "As with most copyright-related cases, the documents are generally not confidential as the very issue at hand is publication of some sort, and the copyright office files are themselves not secret." Which seems to undercut the argument in favor of confidentiality.

And on top of that, it was noteworthy to me that Mr. Troy pointed out a number of instances where these images or substantially similar images are available all over the internet and in various public -- publicly accessible locations. So to put it mildly, I had substantial concerns about the idea that these materials should be maintained under seal. I normally don't allow for a reply briefing in these types of submissions because I don't think it's necessary, but there are a number of issues raised in the opposition submission, concerns that I have just laid out. I will give you an opportunity to submit a

reply, Mr. Salta, if you want to continue to pursue --

MR. SALTA: I will talk to Mr. Knull about it. He's the one that made the motion. If I may, for what it's worth?

THE COURT: Yes, briefly.

MR. SALTA: Can I just make a comment on the whole issue of 36-1? I read the papers, too. I read what Mr. Knull wrote and the response from Mr. Troy, but it's not just about pictures. I just want the Court to be aware. What -- it's about the discovery responses that are attached to the pictures. These are being made public on a regular basis by the Pilates Transparency product -- Project. There is a campaign going on to disparage the plaintiff. Just recently based on information supplied on social media, for example, there is -- I have a comment on one of the posts that says, "Are you aware that it is illegal to claim a copyright if you don't legally have one? It's considered fraud. You could go to -- after Gallagher for damages."

There is a push out there spurred on by the defendants for whatever reason to really, really persecute Mr. Gallagher. Had I written a motion -- the motion rather than Mr. Knull, I would have more -- emphasized more what is happening on social media based on information that's being given to the public; and any idiot, let's face it, on social media, they can run wild with this stuff. Meanwhile, the plaintiff unfairly is being demonized and defamed. That is really our concern, more than

the pictures. Yes, it's true a lot of these pictures are in the library anyway.

THE COURT: Right.

MR. SALTA: But it's more the argument I would have made of the information, the responses that are attached to these pictures in the RFAs, for example, that is being disseminated out there. That is of concern, and I would just finally say, what is the harm? What is the harm if it were sealed?

THE COURT: That's not the standard.

MR. SALTA: I know it's not the standard.

THE COURT: That's not the --

MR. SALTA: I am just talking equity, Judge.

THE COURT: Okay. I hear you. I understand that. I mean, and that is, frankly, partly why I posed the question through Ms. Danzo as to whether there was an objection to maintaining the materials under seal, just so I could understand what the parties' positions were on that, but -- and the bottom line is that's not the standard, and I -- I will give Mr. Troy an opportunity to respond briefly; but frankly, nothing that you just said, Mr. Salta, while it may be concerning to Mr. Gallagher, and I understand that social media is pernicious, and whether defendants have any connection to that or not is -- is a separate question which we are not going to have a mini hearing on here.

MR. SALTA: Okay. I understand.

THE COURT: But the bottom line is, I don't see in that argument any basis for maintaining anything under seal, and the presumption is in favor of public access, and the burden is on the party seeking to maintain the material under seal to justify why it should be under seal, not why it shouldn't be under seal.

So look, I mean, this is a public proceeding. Mr. Gallagher, through Richtone, filed this lawsuit. I imagine that he suspected that there might be blowback from that, and again, I am not suggesting that anybody should be attacked for anything. That's not my view at all. But it is a public proceeding, and various things come along with that.

MR. SALTA: I understand, Judge.

THE COURT: So I will give you an opportunity -- and, Mr. Troy, I will give you a second just to respond for the record -- but, Mr. Salta, I will give you and Mr. Knull an opportunity to respond further by Friday, December 9th, if you want to submit anything in response.

MR. SALTA: I will tell Mr. Knull.

THE COURT: Okay. And if he needs a few more days because of illness, that's fine. Any urgency with respect to the sealing is on the plaintiff's side.

MR. SALTA: Right.

THE COURT: So I'm perfectly content to wait another

week. I'm not trying to put him into a difficult position while he is in the middle of a health situation. So --

MR. SALTA: Yes.

THE COURT: -- I will set the deadline for Friday just because there is obviously an interest in getting this resolved, but I'm more than willing to extend that time by a week or two weeks if Mr. Knull needs more time to respond.

MR. SALTA: Understood. I appreciate that. Thank you, Judge.

THE COURT: Okay. Mr. Troy, briefly if you would like to just make a record in response to what Mr. Salta said, but keep it brief.

MR. TROY: Unlike my normal responses, I will be brief.

Thank you very much, Your Honor. The only reason why we filed last night was because of the hearing today and the December 1st letter from Mr. Salta adding that to the agenda. So basically, I worked over the entire weekend to prepare -- prepare that and finalized it last night when I finally got down here to White Plains. So --

THE COURT: And I appreciate that, but just to be clear, the deadline was the 9th. I was aware of the deadline, and, you know, you didn't have to do that, but it's fine that you did, and you were going to have to do it anyway, so you got it done a little earlier than you would have had to, but go

ahead.

MR. TROY: I have nothing to add other than what I think I made clear in our opposition papers.

THE COURT: Okay. All right. So I am going to reserve judgment on that for now, but as you can tell, Mr. Salta, I'm heavily inclined to deny the motion absent some sort of compelling further information provided in reply, but I'm amenable to hearing further argument, so I will reserve decision.

MR. SALTA: Understood.

THE COURT: Okay. All right. The main things left for us to discuss are the discovery disputes with respect to the interrogatories and the discovery disputes with respect to the RFAs.

Let's start with the RFAs. I will hear from everybody on all of this, but again, I'm going to give you some of my preliminary thoughts. First, it's clear that you have not had any meaningful meet-and-confer discussions about these RFA responses. I'm sure you each have reasons why you think the other one is at fault for why you haven't had meaningful meet-and-confer discussions, but the reality is you just haven't. I think it's fair to say that it would be helpful for the plaintiffs to have a more concrete -- for future reference -- a more concrete set of ideas as to what the defendants' objections are in advance of a meet-and-confer. That was part of why Mr.

Knull pushed back on a meet-and-confer in the first place. At the same time, just saying we are not going to meet and confer is not reasonable or appropriate or within the boundaries of Rule 37, which requires the parties to make a good-faith effort to meet and confer. That just didn't happen here.

Now there is a document that sets forth the defendants' particular concerns with the RFA responses, so there very much is a basis for a meet-and-confer discussion, and there would have been a basis for a meet-and-confer discussion in advance of today. I assume that that has not happened; is that right, Mr. Troy?

MR. TROY: Correct, Your Honor.

THE COURT: Okay. So we are going to talk about this for a while, but then you are going to have to meet and confer about the issues, and the plaintiffs are going to have to try again with a lot of these RFA responses. Some of them the defendants are going to have to try again with or withdraw the RFAs because some of them, in my view, are not clear, and the objections along those lines are perfectly valid. But a lot of the responses are not really consistent with Rule 36 and leave more confusion than clarity with respect to the responses to the Requests for Admission.

I recently wrote something on Rule 36 Requests for Admission, and so I'm just going to cover some of that here to provide a background and foundation for our discussion. Rule 36

is not a discovery device. There's something in one of these letters that suggests there should have been different framing of these questions to better get at facts development, but that's in fact-finding. That's not what Rule 36 is about. The purpose of the rule is to reduce the costs of litigation by eliminating the necessity of proving facts that are not in substantial dispute, to narrow the scope of disputed issues, and to facilitate the presentation of cases to the trier of fact.

This does not mean -- this is my own decision on this issue relatively recently -- that an RFA may only ask about matters that the propounding party believes to be undisputed, and the 1970 amendments to Rule 36 made clear that a party may not object to an RFA solely on the ground that the request presents a genuine issue for trial. Although that is not really the objection that is most prevalent in this particular case.

But again, since the purpose of the request is to ascertain whether the answering party is prepared to admit with regard to the matters presenting a genuine issue for trial, an answer rather than an objection is the only proper response if a party considers that it has been asked to admit something that it disputes. What we have here in a lot of these responses is ambiguity. In response to a properly constructed RFA, a party must either admit the matter, specifically deny it, or state in detail why the answering party cannot truthfully admit or deny it. An RFA denial must fairly respond to the substance of the

matter, and the responding party has an obligation to undertake a reasonable inquiry of information known or readily obtainable by it that allows the responding party to fairly admit or deny the request.

So there are a lot of RFAs here. If necessary, I will go through them one by one and make determinations about whether the responses are appropriate or not, but I would really rather that we take a second stab at this to try to limit the scope of items that I need to specifically rule on; not because I am not capable of it or prepared to do it, but I think some guidance will assist in getting these to a point where they may not be quite as disputed.

So, look, I understand that it will take time to address these RFAs with specificity, but this number of RFAs certainly does not automatically constitute undue burden. That decision that I was just reading from dealt with, I don't know, thousands of RFAs, which was a problematic situation for a number of reasons, and that was a more clearcut case of burden, but even that ultimately led to a decision requiring parties to answer quite a few of those RFAs.

All right. So let me just go through a few categories that we have in dispute, and I will hear a little bit more from you on these because that will help me to understand some of the issues a little bit further as well.

One category that Mr. Troy flagged is with respect to

-- the first bullet point in his letter at ECF 36 requests -- RFAs 1, 2, 5, 7, 8, et cetera. Let's look at a couple of those because I do have a bit of confusion when I read these objections.

First of all, let me just also say, if you look at Rule 36, there is nothing in there about General Objections, and the whole notion of General Objections has been disfavored for years in other contexts, particularly when responding to document demands. This idea of cross-referencing General Objections is really just not the way it's supposed to be done anymore, and part of the reason for that is it's hard to know which of the General Objections are meant to apply to these particular requests. Are there really objections to all one, two, three, four, five General Objections? Do each of those apply to each of the requests? No. Because some of these objectionable or allegedly objectionable terms don't even appear in some of the requests where the General Objections are invoked. So will it be more cumbersome to specifically invoke the objections when appropriate? Yes. But that will also be much more appropriate in terms of the RFA responses.

Part of the way that perhaps you will be able to streamline some of these objections is to meet and confer specifically about the General Objections because if you can address the definitions in a way that is mutually agreeable, it might alleviate some of those concerns on the plaintiff's side

while still allowing the defendants to get at whatever it is they are trying to get at. I don't know if that's possible or not. Some of these things may be too entrenched to actually work out in a meet-and-confer process, but that's what the meet-and-confer process is for. There aren't 50 General Objections; there are five or six, five or six. And that seems like something that might be able to be addressed, and also that would provide more clarity when we get to the actual responses.

So let's look at Request for Admission No. 1, which is representative of this whole category that Mr. Troy has brought to the Court's attention. Request for Admission No. 1 says, "Admit that neither Wee Tai Hom," so the same individual who we were talking about earlier, "nor Healite," H-E-A-L-I-T-E, "Incorporated, gave you a photograph of the image shown in JHP-01." I assume that's a Bates number, right, Mr. Troy?

MR. TROY: Actually, that's from the -- what we had done was, because of the number of photos, we had combined them into --

THE COURT: Oh, the pdf portfolio.

MR. TROY: The pdf portfolio.

THE COURT: Which you referenced. I don't need to see the portfolio, but I thank you for bringing them. So JHP-01 is some sort of reference point.

MR. TROY: It's the first document in the portfolio,

in that -- in Portfolio One.

THE COURT: And I understand -- thank you. And I understand why to achieve maximum clarity, the plaintiffs included the thumbnails of these photographs in the responses. It wasn't entirely necessary to do that, but I understand. We are trying to be precise here, and so I appreciate that considering the need to make sure we are all talking about the same things, but the response is that: "Subject to the General Objections," we have now talked about that, "plaintiff admits it did not, to the best of its recollection, find this image in the boxes of materials, but otherwise denies this Request for Admission."

I mean, I don't know what that means, and what -- when we're talking about the boxes of materials, I assume you mean -- I shouldn't assume -- but I am going to assume we mean materials received from either Wee Tai Hom and/or Healite Incorporated?

MR. SALTA: Correct.

THE COURT: And that is somehow the way -- if I understand correctly -- that plaintiff traces some of the copyrights at issue in these materials?

MR. SALTA: Well, it might be some of the way, but I believe what Mr. Knull was objecting to was the word "gave." In other words, what he is arguing, I believe, is that: What do you mean by "gave"? Physically gave? Or transferred the rights thereto? Because there is a contract. What do you call -- a

contract of sale of all the business assets, including copyright, to Mr. Gallagher. So is that a giving?

THE COURT: Okay. And that's one of the General Objections.

MR. SALTA: Exactly.

THE COURT: Okay. And that makes sense now to me. I didn't really understand why that was fraught, but okay.

Mr. Troy, I mean, is that something that you think could be worked out in terms of the definitional aspect? I mean, I understand -- well, tell me a little bit about this because I'm just having difficulty understanding to some extent what exactly is being denied here, but now I take the point that the plaintiffs are denying that these -- this photograph was given to them because in their understanding of what it means to have been given, it was given to them.

MR. TROY: Your Honor, and we can go through every one of the ones that I categorized with that, this actually goes to the heart of the case because Mr. Gallagher is on record of having previously said in a filing with this Court that after he received all of the materials from Wee Tai Hom/Healite, he documented that, which was the first time there's any documentation of any of these photographs, in the 1992 Deposit Copy. So the image does not appear in the 1992 Deposit Copy, yet this is one of the many images that Mr. Gallagher has filed takedown notices on. So we are struggling to find out what is

the scope of his copyright claim, and it requires us to go down to individual photographs to understand that.

Now, if Your Honor has a better word than "gave," that would be fine with me, but we struggled with trying to come up with an appropriate word for each of these interrogatories in order to nail down what is in this universe of copyright claim.

MR. SALTA: If I may, Judge?

THE COURT: But -- hold it one second -- are you genuinely trying to determine whether Mr. Gallagher and Richtone are asserting a copyright claim over this photograph?

MR. TROY: Of course, because the --

THE COURT: Well then, why not ask that?

MR. TROY: Well, but here --

THE COURT: You are trying to get at here what the basis of that copyright claim is, and you're trying to get him to admit that he has no basis for the copyright claim, which of course he is not going to admit because that's the issue in the case.

MR. TROY: I understand that, Your Honor, but in order to have a claim to copyright, okay, given the fact that all of this stuff was made 58 years ago, there is a chain of title.

THE COURT: Okay. I understand that, but that's the issue in the case, right? I mean, if there is a fact or even a legal issue that you are trying to get an admission on, it can't be: Admit that you don't have a copyright on this photograph.

MR. TROY: No. Of course, I can't ask that. But what I am asking is, is: Was this given to you when you acquired these assets?

THE COURT: Right.

MR. TROY: That's the -- that's -- the sum and substance of the question was: Did you receive the image?

THE COURT: And do you mean the -- in that case, do you mean the actual physical image?

MR. TROY: Yes.

THE COURT: Do you mean -- okay. And -- okay. That I understand, and I take it that there is no dispute that this image is not in the 1992 Deposit Copy, right?

MR. TROY: I'm unaware of a dispute on that point or --

THE COURT: Okay.

MR. TROY: -- any of the other ones that we identified in this line of questioning.

THE COURT: Okay. Mr. Salta?

MR. SALTA: If counsel wants to ask if a physical picture, a physical manifestation of this photo was actually hand-delivered.

THE COURT: Or delivered by any other means.

MR. SALTA: Right, the actual picture was physically delivered by hand or electronic means, that's one question that can be answered.

THE COURT: And the answer to that is no.

MR. SALTA: Right.

THE COURT: I mean, you admit that it was not.

MR. SALTA: Right.

THE COURT: Okay.

MR. SALTA: But the rights thereto were -- I mean, that's the whole separate thing that -- it's obviously where this is going.

THE COURT: Well, I mean, I think at some level it's Mr. Troy trying to ascertain what the basis for the claim of copyright is, and if -- I don't know as a legal matter whether it's meaningful to rule out the physical transfer or --

MR. SALTA: Fair enough.

THE COURT: If that is meaningful, then so be it. I mean, does that -- Mr. Troy, does focusing on the physical transfer of the photograph or negatives, if that comes up later, does that satisfy what you are trying to get at in terms of narrowing the issues?

MR. TROY: I mean, if we -- if we want to modify our requests, I mean, we can certainly do that. I -- you know, I have to be honest with you, we struggled for probably a month trying to come up with appropriate wording to make it clear what we were asking.

THE COURT: Right.

MR. TROY: Because an RFA, just like you pointed out

earlier is, you know, what are RFAs all about? And it's basically is, let's get answers to questions that we can avoid sitting in a trial for because if I had to go through a total of, what --

THE COURT: 2,000 images or whatever.

MR. TROY: Well, there is the 2,000 images, but the focus is really more on the 43 images that are contained in the portfolios because those are the images where the plaintiff has done takedowns yet we cannot find these photographs in the Deposit Copy that Mr. Gallagher previously represented was essentially a memorialization of everything that he got or received from Healite/Wee Tai Hom.

MR. SALTA: Okay. That should be fairly easy to request and to answer what physically was given.

THE COURT: Right. I think that's right. I mean, at some level I think it's the concern and -- look, RFAs are always a fraught exercise, frankly, for the responding party. I was never a huge fan of RFAs in practice because it often led to this and didn't really wind up narrowing the issues. It just made for more discovery disputes, but it's provided for in the rules, and we have to address them, and that's fine.

But I think if the real question is to confirm that this image, this photograph was never physically transmitted by Mr. Hom or Healite to the plaintiff, whether that's Richtone or Mr. Gallagher, then it can be asked that way, and that seems

like it should be answerable. So I would -- again, this is what I think we could achieve through the meet-and-confer process. I am going to facilitate this with some of these categories and then encourage you to go back and either reframe or whatever needs to be done with these requests, but it's best to work through them first to see if there can be ways that they can be answered.

And but I will say also with respect to the answer, this idea that plaintiff admits that it did not, to the best of its recollection, find this image in the boxes of materials, I am not sure what -- is that trying to preserve a little bit of room to say maybe it was or it wasn't? That is an ambiguous answer. And if the answer is: We can't determine that because we don't have the necessary information, there is a specific phrasing in the Rule 36(a)(4) that provides for how to answer a Request for Admission if you don't have sufficient information after conducting appropriate inquiry and diligent research. So -- and it's not this. So that puts the burden on the plaintiff or the responding party to go and conduct that appropriate inquiry, and it seems as though there should be a relatively straightforward answer to: Was it provided in a physical form or not? And we can try to dispense with some of this dancing around the issue or trying to preserve certain opportunities to potentially come back and have a different recollection in the future because that is problematic as well.

All right. So that's -- we talked about that category. Let's move on to the next category, and I refer to this category as the "Christmas card objections" category. I don't really understand those objections, Mr. Salta. This is in the second bullet point. RFA 8 is one example, but it's a whole series there.

"Admit that either Hom or Healite gave you a photograph of the image shown in JHP-08." And again "gave." We've got that issue. It can be restated to make sure that we are talking about a physical transfer. The first sentence of the response is the same, essentially, as what we just discussed, "Subject to the General Objections, plaintiff admits it did not to the best of its recollection find this image in the boxes of materials, but otherwise denies this Request for Admission."

Then there is this further explanation about, "This is a Christmas card, apparently one of the annual cards which Joe Pilates sent to clients of his business and was prepared for that business purpose. As it was well known that Joseph Pilates promoted his business through annual holiday cards to clients. This image was likely" -- it says "to," but I think it probably means provided to or something -- there is a word missing there -- "was likely to Mr. Pilates for limited publication in a card."

But why do we need that whole second and third

sentence?

MR. SALTA: I don't know, Judge.

THE COURT: Okay. That's just -- I mean, that's interesting. I mean, okay. But it seems irrelevant to me and just complicates the response to the Request for Admission in a way that's really not helpful. And so that -- that type of response exists in at least eight of the Requests for Admission. So let's take a look at that and see if that can be eliminated.

Couple of the other -- and I'm just going to jump around a little bit. And there are a couple of places where, as I look through, I thought, that's just not a particularly well-founded objection. In No. 27, for example, "Admit that you don't possess the negative for the image in JHP-26."

Plaintiff also objects to the use of the term "the negative" as being vague? Really? I mean, come on. We are talking about negatives, photographs and negatives. We have talked about that in court now twice. I don't think that that's a vague or ambiguous term. If it is, it would -- the vagueness of that term would need to be explained further. It seems perfectly clear to me.

And also the use of quote-unquote "negative admission," which is has nothing to do with the negative. It's just objecting to the phrasing of -- the double-negative phrasing of the request. I mean, whether that's an artful phrasing or not, that's not a basis for an objection

particularly.

So the plaintiff denies the Request for Admission. That's fine, meaning -- which I would interpret to mean that the plaintiff possesses the negative for the image in JHP-26 because to deny the request that you don't possess the negative would be to suggest via logic that you do possess the negative. And if that's the case, fine. But the objections there are not particularly well-founded, and they are not necessary, either.

29 is the same thing. Again, that's actually denied. So it's just -- if it's going to be denied, just deny it. It's not that complicated. If the plaintiff possesses the negative, the plaintiff possesses the negative. So that's a denial.

MR. TROY: Excuse me, Your Honor.

THE COURT: Yes.

MR. TROY: I don't mean to interrupt, but --

THE COURT: Sure.

MR. TROY: -- this is an example of one of the times where plaintiff's counsel inserted the wrong picture from the portfolio that we were asking about.

THE COURT: Okay. Well, that's -- I didn't realize that, but this is -- I mean, there are a couple of bullet points here where the concern is that plaintiff failed to respond to the correct images. I mean, that's a quintessential example of something you should have met and conferred about. I mean -- okay.

MR. TROY: An amended response was --

(Cross-talk)

THE COURT: Not with respect to 28 through 30. That was only with respect to 50 -- so a couple of the ones in the 50s.

MR. TROY: 56 to 59.

THE COURT: 56 to 59, although apparently there is some objection to the way that was done also. So but this is 28 through 30 where Mr. Troy claims that plaintiff failed to respond to the correct images for those three. That was -- I was going to come to that in a moment, one of the next items on my list.

MR. TROY: Sorry.

THE COURT: Mr. Troy, if there is confusion about which ones are which, just fix them. Talk to each other. Get it straightened out. I'm sure to the extent it was -- that the wrong images were inserted, I have to believe that that was a good-faith mistake. I mean, it's -- no one is going to get away with that, so it's not particularly clever to try to do that. So just fix them. You've got to talk to each other and get them fixed and get it done in a way that makes sense and actually is addressing the items that Mr. Troy is attempting to address.

I will say there are a couple of these RFAs that I also don't particularly think are well-worded and that the objections seem appropriate. The ones that immediately jumped

to mind were No. 64. "Admit that there are photographs in the book depicting Clara Pilates that Hom or Healite did not give you."

"Plaintiff is without knowledge as to which images might be covered by this vague request, and therefore plaintiff denies."

I mean, that's -- you know, we're talking about a book. How many images are in that book? I mean, I'm not sure exactly what is accomplished by that Request for Admission and whether it's really appropriate to say, go look at this book, which has dozens or hundreds of photographs, and examine each one, and I guess all you need -- would really need to do is find one that was not given or physically transmitted, but that's a large and sort of sprawling request there.

MR. TROY: First of all, Your Honor, the book is Mr. Gallagher's book, so we are not talking about some random book.

THE COURT: I understand.

MR. TROY: And this was the book that was published in 2000, I believe was the year, that was supposed to be an historical perspective of Joseph and Clara Pilates; and the reason for these questions is, is that we have other information that these photographs were obtained from completely different sources, including the University of Maine, the New York Public Library, and yet they were published in Mr. Gallagher's book;

and where this gets even more complicated is, is that in the many takedown notices that were filed by Mr. Gallagher and his company, they have used the book, which is registered as a compilation, and as you know from copyrights, a compilation does not go to the underlying material. It goes to the material that is added, and in this case the, you know, organization of the materials and whatever additional comments may be made.

So what we are trying to do is we are trying to kind of put some fences around what are these copyright claims that are being made? Because he is going to third parties and using the Deposit Copy certificate registration, and he is using the book certificate of registration to take down other people's websites.

MR. SALTA: Judge, why doesn't counsel just ask: Are you claiming copyright to this picture? Are you claiming copyright to that picture? It seems like this is such a roundabout way of trying to get to a certain point.

THE COURT: Or even if it's not: Are you claiming copyright? It could be the same type of question that we talked about with respect to the first category. Did you receive a physical copy of this picture on page 72 of the book from Hom or Healite?

MR. SALTA: Right.

THE COURT: And if there are particular images in the book that you have that concern about, then just identify them,

and then you will be able to argue at summary judgment or at trial that some of these photographs in the compilation were not traceable to this physical transfer; and to the extent that is legally relevant, you will be able to have that information without -- I actually think it will be more helpful for you, it would seem, to be able to focus specifically as opposed to just saying there's some -- some images in this book that may not have been transmitted that way. I think being more precise about it will be helpful for everybody.

MR. TROY: Well, Your Honor, there was -- it was in our, I believe, interrogatories.

THE COURT: Well, we'll get to the interrogatories in a minute.

MR. TROY: I believe we tried to ask those questions in context of the interrogatories.

THE COURT: Okay.

MR. TROY: If we are trying -- as I say, we are trying to understand what -- what is this claimed universe because it keeps expanding and keeps changing from what was represented to have occurred in 1992 versus today and all the takedown notices.

THE COURT: Right. I understand what you're trying to do. I just think that that particular framing of it in this general, vague way is not a great way to go about it. So I think that -- that is an issue that I had looking at Request 64. It's an issue that I had also from looking at Request No. 66,

which, frankly, I had a hard time deciphering that request generally, but it sort of raises the same idea that we are talking about some universe of things that are claimed to have been in the possession of Joseph Pilates, and which of these we are talking about, I don't know. I'm not sure how the plaintiff is supposed to provide a precise response because I'm not even sure it's entirely clear what the universe of photographs that he claims were in the possession of Joseph Pilates is. I mean, maybe that is clear to all of you. It's certainly not clear to me. So there are a couple of those in here where we are talking about these broader sets of materials that I think will benefit from being more narrowly focused and more narrowly tailored.

MR. TROY: Your Honor, if I may?

THE COURT: Go ahead.

MR. TROY: I will try to figure out how to restructure it but, for example, the instance and expense language that is in the RFA 66 --

THE COURT: That's not the concern with the language. I understand that that's a term of art. It's the -- it's the: Any of the photographs that you claim were in the possession of Joseph Pilates at the time of his death. That's the book. That's the equivalent of the book in 64, right? It's some universe of materials that you are asking about in a broad and undefined way.

MR. TROY: Because plaintiff has -- has shifted their

legal theory throughout this case.

THE COURT: Okay. Look, I'm not making rulings on these things. I'm trying to provide a bit of guidance for you to go back and take these under consideration. If you feel the need to persist with that framing, you have a pretty good sense that I will probably not order that to have been admitted or order a further response. So you can choose to do whatever you want with that, and if it's not possible to reframe it, you can withdraw it or you could take another shot at it. That's entirely up to you.

There are a number of objections also to things having to do with individuals who are not parties to the case where the objection is in part that these individuals are not parties to the action and without standing to make any discovery demands. I mean, I think those are pretty well mooted now by the fact that we're conducting discovery on the entire universe of images. So those responses will have to be revised to eliminate those objections as well.

Look, so these are the number of different categories. I don't think I've addressed each and every one of the bullet points in the plaintiff's -- excuse me -- in the defendants' letter at ECF No. 36, but I've addressed a number of them, and I think there's enough guidance here to allow you to meet and confer and either revise the RFAs or figure out which ones we are going to insist on answers for. I don't think all of them

need to be revised probably. The responses are going to need to be substantially revised, but you have to talk to each other because if Mr. Troy wants to provide a revised set of RFAs, then he is going to need some time to put that together, and some of these issues I think should be the subject of a meet-and-confer before Mr. Troy goes back to the drawing board because the idea would be, hopefully, that when he does the second attempt at the RFAs, that they will be questions that can be answered without all of the throat-clearing objections and ambiguities that are currently present in the responses.

So look, the deadline for discovery is January 31st. It's a busy month with the holidays and whatnot, so make sure that the RFAs are served within the next week or two and meet and confer before that so that the responses can come in in mid January, and if there are issues to be worked through even after that, you can bring them to my attention then, and at that point I will just rule on them, you know, whether that's in a conference or in a written order. I think at that point you will have done the best you can to minimize the scope of the disputes, but right now we have disputes with respect to -- I don't know -- 70 of the 90. That's not a good use of my time or yours because even if I were to go through all 70 of those, then you would have to go back and do them again anyway. So I am going to ask you to do them again first, and then -- based on what we've talked about here today, and then we will see what's

left in terms of disputes. Okay?

Anything else that anyone wants to say about the RFAs before we move on to the interrogatories? Mr. Salta?

MR. SALTA: No, Judge.

THE COURT: Okay. Mr. Troy?

MR. TROY: No, Your Honor.

THE COURT: All right. Let's, while we are talking about the RFAs, Interrogatory No. 12, which on the one hand, I am inclined to just set aside entirely because it was raised sort of late in the process, and the plaintiff has not had an opportunity to respond to that. Also, in light of the revised RFA process that we are about to go through, I don't want to get into too much detail about request -- Interrogatory No. 12. I will just say I have never seen an interrogatory quite like that. I have never seen one. I don't think it's appropriate, frankly. I would be curious to see some authority for that as an appropriate form of interrogatory because Mr. Salta and Mr. Knull are right. First of all, it's an 86-part interrogatory, at least. I mean, it's 86 parts or it's not 86 parts because some of the items are going to be on qualified admissions, but it's probably a 30 -- at least 30- to 50- to 70-part interrogatory with one, two, three, four subparts to each. So on the interrogatory count alone it's probably impermissible.

But on top of that, as I laid out when going through the standard for what Rule 36 is meant to accomplish, it's not a

discovery device, and this is essentially taking the RFAs and turning them into a discovery device, and that's an interesting and creative approach to kind of getting around the limitations of Rule 36; but basically, transmitting or transferring RFAs into multi-part interrogatories that require substantive responses in this fashion is just -- it's not anything I have ever seen. So I'm not inclined to make the plaintiff submit a detailed response because I just don't think that that's appropriate. But let's see where we are at the end of the revised RFA process because maybe there is a narrower way of asking about one or two or three items that might cause me to look at that differently, but on the surface that just seems patently improper.

Let's turn to the interrogatories, which we had before the Court at our last conference but we set aside for a variety of reasons. There are a total of one, two, three, four, five, six, seven interrogatory responses that are at issue here. I wonder to what extent some of this overlaps with the RFA responses, but we can talk about that.

Mr. Salta, before I forget, we covered the RFAs. Coming back to your point about experts, is it your position that having expert discovery take place sooner would limit the scope of the work on the RFAs or is that really more a point about the interrogatories?

MR. SALTA: Well, I was just thinking, for example, on

the issue of what was physically given to Mr. Gallagher by Hom, and if the expert were -- with Mr. Troy -- go through the box of the material, that would answer a lot of questions.

THE COURT: How would it answer the question of what was given to him by Hom?

MR. SALTA: Well --

THE COURT: You mean if it's there?

MR. SALTA: If it's there.

THE COURT: And it was given to him?

MR. SALTA: If it's there, yeah.

THE COURT: Okay. Mr. Gallagher can just go through and tell us what is there and what isn't there. That's all -- that's not expert work. That's just -- that's a fact question.

MR. SALTA: Okay.

THE COURT: I understand the overlap because at some -- at some level there is going to be an amount of work that the expert would have to come in and look at all of this stuff.

MR. SALTA: They would want to verify it anyway. So he can say, yeah, I got it. Yeah, show me. I mean, it's going to involve the defendant anyway to go over the stuff to see what was there or what's there.

THE COURT: Well, not if he says he didn't get it, and then he confirms that it's not there because that's --

MR. SALTA: Correct. I am thinking about the other -- the converse of that.

THE COURT: Okay. But I understood that Mr. Troy was mostly -- and maybe I have this wrong -- but mostly focusing on images that he thinks Mr. Gallagher did not receive in that process.

MR. TROY: Correct, Your Honor. And just to add to that, subsequent to the transaction in 1992, Mr. Gallagher acquired the old home of Joseph and Clara Pilates. I'm not sure the year. Mr. Gallagher could probably answer that. I think it was 1998, but based upon representations, and Mr. Gallagher seems to be very prolific on social media, there is a treasure trove of additional materials that he's received or that he now claims ownership over because he found copies of these materials in the house; and we're still trying to segregate what was supposedly acquired as part of the business versus what was supposedly acquired by purchasing the house. And as you know, by purchasing the house, even -- whatever contents are in the house does not confer copyright. It's just the -- you know, it's just a mere possessor of property, not the possessor of a copyright.

THE COURT: We will evaluate the legal claim.

MR. SALTA: That's a legal question, and there is a Purchase Agreement that transferred all assets and -- of the business and the copyrights included to Mr. Gallagher, so whether it's found later in the bathroom of the house or it was given to him by Mr. Hom I think is quite irrelevant, but if you

want that information.

THE COURT: Well, I mean, I think the point Mr. Troy is making, if I understand it correctly, is he is trying to figure out what the basis of the copyright claim is for these different materials, and for some it's going to be that they were physically transferred. For some it's going to be that they were pursuant to this contract of sale. For some it's going to be whatever else it's going to be, and we are just trying to get to a point where the basis of that is clear, the factual basis. And then Judge Karas will have the opportunity to decide whether that is -- that factual basis supplies a valid legal basis, whether it's pursuant to a contract or pursuant to whichever statutes are at play when it comes to those materials. I -- for discovery purposes, though, that all seems relevant.

MR. SALTA: Okay.

THE COURT: And so, you know, look, these -- in the interrogatories there were some objections that were based largely on the idea that discovery shouldn't be so broad because the counterclaim is what brought all of these additional images and allegedly copyrighted materials within the ambit of this case. But that's no longer a valid objection, obviously. So that -- that gets to Item 4 in particular, Interrogatory No. 4.

To the extent that these objections are based on burden, I don't have a great sense of how burdensome it is for the plaintiff to respond to some of these interrogatories. So

Interrogatory No. 3, this gets back to something that's similar to what we just talked about with respect to the book. Interrogatory No. 3 is: "Identify all photographs or other matter reproduced in the book that was not in your possession as of September 1st, 1992, stating the date on which you received such photographs or other matter, the person from whom you received it, and the consideration you paid or gave such person."

I just don't really have a clear idea that -- as to how burdensome these requests are, and the response seems to be, you know, to provide a list of a handful of pages in the book that where the materials were found in the house, for example, and then there is another reference to something called "Return to Life." Okay. And that didn't answer all of the parts of the interrogatory, but it provided some information. I'm not sure if that information is clear or not to Mr. Troy. I mean, clearly, it didn't attempt even to address all of the elements of the interrogatory, and it's not -- again, I have a hard time ascertaining whether that is meant to be a way of addressing each part, meaning that those are the only pages in the book where materials were not in Mr. Gallagher's possession, Richtone's possession as of September 1st, 1992.

So, again, to the extent part of the objection here is burden, I'm not sure I understand the burden, and you can explain that to me, Mr. Salta. The objection would be "based on

standing" is really not a particularly valid objection at this time for all of the reasons we've talked about; and you know, to the extent part of the response is, "not all such material is at issue in this litigation," I'm not really sure if that's particularly valid anymore because what's at issue in this litigation is certainly broader than what you and Mr. Knull were suggesting it was in responding to these interrogatories back in September.

So I'll let you weigh in on some of that.

MR. SALTA: The way I would rewrite this -- again, this was from Mr. Knull -- but the way I would rewrite this is basically saying the photographs on pages 19, 29, 105, et cetera, were found in the house, which is obviously post 1992, as is the photograph on page 151 "Return to Life," which also is post 1992. And with regard to -- I guess we could flesh out how he received it, the consideration, if any, that was paid. That could be answered pretty easy. But with regard to the pictures, I guess that's the answer.

THE COURT: Okay. And, Mr. Troy? Your thought on that?

MR. TROY: A clear answer along those lines would be great because we are trying to, as I say, narrow down this universe.

MR. SALTA: Yeah, I believe it was probably understood between Mr. Troy and Mr. Knull that by saying it was found in

the house was -- I wouldn't have written it that way, but it means it was after 1992 because the house was purchased after that. So --

THE COURT: Well, I mean, that -- even if that is clear to Mr. Troy and Mr. Knull, it's not clear to --

MR. SALTA: It wasn't clear to me the first time I read it, either.

THE COURT: It was not clear to me, and to the extent that there would be any interest in using these materials for other purposes in the case, it wouldn't necessarily be clear without further explanation. So, you know, a more comprehensive explanation there just to address the specific point raised would be helpful.

All right. Let's look at No. 4. "For each of the photographs that appear on pages 14 through 168 in the pdf of the collection," which is a section of a document that has a Bates number, "identify the photographer who took such photograph and the year in which such photograph was taken. If you don't have a record of the actual year, state what you believe to be the estimated date."

Again, I mean, there are a variety of objections here, including that, you know, this is a fishing expedition on behalf of litigation funders, but again, I think that should be set aside here unless someone tells me that these images are not within the ambit of the counterclaims, but I don't think that is

the case. So there doesn't seem to have really been any answer to this, Mr. Salta.

MR. SALTA: Okay. I would also add -- well, yeah. Isn't this also basically asking for multiple interrogatories? I mean, we are kind of like hitting the same issue of how many responses, sub-responses are involved here.

THE COURT: I mean, that is a fair point, frankly, Mr. Troy. I mean, you know, depending on how you were to read these interrogatories, they could easily be read as well above the limit provided by the federal rules. I mean, there are different ways of interpreting what is a subpart and what -- and how we're supposed to count the interrogatories, but a lot of these seem to be multi, multi, multi-part interrogatories. We talk about different photographs and, you know, the five different pieces of information that we are trying to get about each photograph.

Now, should each photograph be considered an interrogatory? Should each subquestion about each photograph? I mean, I think we don't have to get to that point. If you are looking at a photograph, and you're trying to get information about who took the photograph and when, who took the photograph and when are not two separate interrogatories, but who took Photograph 1, who took Photograph 2, who took Photograph 3, are those not separate interrogatories?

I will say one thing that's interesting about this set

of interrogatory responses is we don't deal with this type of interrogatory in this District very often because there are local rules that provide for limitations on what can be asked in terms of interrogatories. There are no objections along those lines for -- I'm not sure why -- because there might be valid objections based on some of those Southern District of New York limitations, but in any event, this set of interrogatories does seem to get at a whole lot of information, Mr. Troy, that I am not really sure it's appropriate to order responses to each and every part of each and every one of these interrogatories.

MR. TROY: This interrogatory highlights the shifting sands that we've been dealing with in this litigation, and that is, is that I have communications from Mr. Knull going back to I think 2015 or '17 in connection with a dispute with another client of ours where he made the clear representation that the photographs are -- we don't know who took any of the photographs. Then all of a sudden in halfway through this litigation we are finding out that Mr. Knull now believes, and that there is evidence which we have not seen any of, that Joseph and Clara Pilates took these pictures, including using whatever was a selfie back in those days. And what we are trying to again get at because it's Mr. Knull's position has been -- and that we've been dealing with the last, what, seven years -- is, is that by having the mere possession of the negatives, by having received this through this chain of title

of these, as he says, unpublished or limited published works, that he doesn't need to know who the photographer was. He can just simply claim ownership of it, which is antithetical to the law. So we are trying to get to the bottom of: Well, which ones fall in this category? Which ones fall in this category? Which ones fall in this category? We are trying to understand. I mean, I can't help but that there is over 2,000 photographs.

THE COURT: Well --

MR. TROY: Okay? And then just to add to that, if you don't mind.

THE COURT: But that begs the question of whether interrogatories are the appropriate vehicle to get all of the information because -- and I will say, and that doesn't let the plaintiffs off the hook in terms of providing the information. I'm not suggesting that those inquiries are irrelevant. They seem like they may very well be relevant, but whether interrogatories are the best way to get that information as opposed to a deposition is a different question. Now --

MR. TROY: Well, Your Honor --

THE COURT: But I will say -- let me just finish.

MR. TROY: Okay.

THE COURT: A deposition where Mr. Troy has to ask thousands of questions about all of these things is going to take forever, and while there is a presumptive limit on the scope of a deposition under the Federal Rules of Civil

Procedure, I am not -- by suggesting that doing this through the vehicle of an interrogatory might be problematic or overly burdensome, I'm not suggesting that that will allow plaintiff to avoid answering those questions. They might have to be answered in a different form or a different setting, but certainly if there is going to be an inability or an unwillingness to answer those questions in interrogatory form, they would have to be answered in deposition form, and I would have to imagine that that deposition could not be completed in seven hours.

So again, without ruling in advance on any issue, that seems almost inevitable because there are a lot of different components here, and the defendants are trying to get clarity as to what the scope of the claims are and what the scope of the defenses are going to be, which plainly seems to fall within Rule 26 and the permissive scope of discovery pursuant to that rule.

So, Mr. Salta, I mean, it's a fair point to say that there are a lot of different components here but, you know, if they are not going to be answered this way, they are going to have to be answered some other way.

MR. SALTA: Oh, understood. And if maybe counsel could whittle down the universe of photographs, that would be helpful as well.

THE COURT: Okay. Go ahead, Mr. Troy.

MR. TROY: What Mr. Salta is actually asking me to do

is to pretend that Judge Karas has ruled on his motion to dismiss Count Three.

THE COURT: No, I don't think he's saying that. I think he's asking if there is a way to focus the inquiry.

MR. SALTA: Yes.

THE COURT: If the answer is no, because you need to have this information for all 2,000 items, and those things need to be covered individually, well then, that may be the answer. I don't -- it may not be even possible to have representative groupings or samples. I don't know. It may be that there are some where you genuinely know the answers to these questions already, and you don't really need to get them laid out specifically. I don't know that, either. Maybe not. And maybe because you believe that there have been shifting explanations you can't rely on what you think you know because you don't want the information to change again in the course of this case. I understand that if that's your position as well.

So what I would like to see happen, though, is there to be some tailoring to some extent because I am sensitive to the objection that this appears to be, or at least could easily be interpreted to be, a list of interrogatories that vastly exceeds the permissible scope of interrogatories. I'm not sure how we define what one interrogatory is. I might have to hear further briefing from you or short submissions from you on that issue, but, you know, if we are talking about 1500 images for a

particular interrogatory, I don't see how that can realistically be construed as one interrogatory.

MR. TROY: I appreciate the dilemma. I mean, back in my earlier days of practice, we didn't have these same limitations.

THE COURT: Uh-huh.

MR. TROY: And I do appreciate that. You know, we could have just as easily submitted every single one of these as an RFA.

THE COURT: Right.

MR. TROY: And basically said, you do not know who the photographer is. Admit that you don't know who the photographer is.

THE COURT: Right. There are no limitations on RFAs, as you know.

(Cross-talk)

THE COURT: -- crazy case.

MR. TROY: So we are going to get at the same thing through a slightly different vehicle. I mean, if that's really what plaintiff is insisting on, I'm happy to give them a set of RFAs that are 4,000 questions long.

MR. SALTA: Or you can ask: Who -- out of all these pictures, who do you know took the pictures, et cetera, et cetera? It could be zero.

THE COURT: Well, again, so now this gets to my

earlier point about meeting and conferring because once you start talking to each, I feel like I'm witnessing a meet-and-confer happening live in front of me, which is not really what I want to do.

So I think the overarching point here is that I think Mr. Troy is absolutely correct that these inquiries are going to be answered at some point in the discovery process through some discovery vehicle. So it's perhaps a pyrrhic victory to beat back the interrogatories only to then have to face thousands of Requests for Admission and then potentially try to argue that those are unreasonable because they are too burdensome. I don't know. We can encounter that question on a different day. But whether it's through RFAs, whether it's through deposition testimony, whether it's through interrogatories, these questions are going to have to be answered; and again, I leave myself some room to say that there may have to be some outer limits on it because it's not -- at the end of the day, it still has to be proportional to the needs of the case. But when we are talking about a case having to do with whether certain images and materials are subject to copyright protection, understanding the factual basis for that copyright claim seems highly relevant to and proportional to the needs of the case. What's problematic is the sheer volume here, and that's what potentially makes it burdensome and may raise questions of proportionality. But that's why I encourage you to discuss this with each other and

figure out if there are ways of streamlining this or creating a process for providing the information that's being requested in some form because the requests fundamentally are getting at information that seems certainly relevant to the claims and defenses in the case, and it's a matter of figuring out how that information is going to be transmitted.

So we may very well have to have further discussions about that, but I think in the first instance you all should have discussions with each other about how to go about getting that information, providing that information, having it be as clear as possible. Look, if it were me, I'm not sure I would want to have my clients sit through days and days of deposition about each and every one of these photographs. That's hard to prepare for. It's hard to be precise about. It's a challenging way to go about this, especially if in order to prepare for that deposition a person would have to conduct the same research that he or she would have to conduct in order to answer these as written interrogatory or RFA responses.

But, you know, again, in the Southern District of New York this type of interrogatory practice is really not favored, and there are local civil rules that govern that, so I have a hard time sitting here and saying that these interrogatories all must be answered in this way because, again, that's just not the way we typically do things here. It's a bit of a quirk of S.D.N.Y. civil practice. I acknowledge that. But the rules are

what they are. And so given that concern, given the concern about the volume of the interrogatories, you know, I'm not going to sit here and say that they need to be answered as written in their entirety, but again, I'm trying to provide you some guidance here to make this process as efficient as possible. That impression that I have is not because they are improper questions. Okay? They are questions that are going to need to be answered, and the Local Civil Rule 33.3 attempts to funnel the discovery into other formats, most notably depositions; in this case, RFAs potentially as well, given the nature of the requests. So it doesn't -- it doesn't absolve the plaintiffs from having to answer the questions. And frankly, this is a situation where answering them in interrogatory form might be better because it could be done over time. It could be done in a way that makes sure that the answers are provided clearly and efficiently. I don't know.

So I leave you with that, and again, encourage you to meet and confer further about this to figure out how best to proceed because these questions are going to need to be answered or at least a substantial percentage of them are going to need to be answered in some form, whether that's plaintiffs agreeing to answer these interrogatories, defendants reframing and submitting a boatload of additional RFAs, or Mr. Troy preparing an extremely long deposition outline, and Mr. Gallagher presumably having to sit through an extremely long deposition to

answer all of those questions. I mean, they are all suboptimal, frankly, as ways of getting at it, but, you know, I still continue to think, as I said last time, dealing with all of this in one litigation instead of 50 separate litigations in 50 different courthouses across America as we litigate each of these takedown notices separately is probably more efficient in the long run even if it's going to be burdensome in the short run.

So I don't really think that there is much more for me to say on that. I hope I've given you some guidance that will be useful. Again, maybe it's (noise interruption) resolve disputes. I'm not trying to sidestep that responsibility, and I will come in and make formal rulings on all of these things if need be, but I think everyone will be best served if you went and tried to figure out a path forward here over the next couple of weeks rather than have me make rulings and then have you go back to the drawing board and do it all again anyway. I think that probably duplicates the work in addition to adding layers of review from me. So I think having you take a further shot at these responses and figuring out where there might be points of agreement would be the best way to go forward.

Mr. Salta, what else should we discuss today? I think that's it from my lengthy agenda, but tell me what I'm forgetting.

MR. SALTA: Well, we have the other -- Interrogatories

6 and 7 was also objected to, and --

THE COURT: I'm just -- just hold on while I get that one. By the way, I did -- while I'm looking for that -- there was sort of an additional item thrown in in Mr. Troy's letter having to do with seeking complete responses to Request Nos. 44, 45 and 46 from the third request for production of documents. That's the first I heard of it is when I got this item in the agenda, so I'm not going to address that. Plaintiffs haven't even had a chance to respond to that yet. So I haven't forgotten about that one, but we're not going to discuss that one today.

All right. Interrogatory No. 6, "Identify by indicating the page number and position on the page each photograph in the book for which you possess the original negative." And then No. 7, "Identify by indicating the pdf page or Bates number and position on the page each photograph in the collection for which you possess the original negative."

MR. SALTA: Now that -- that -- that's kind of like what I was getting at earlier.

THE COURT: The expert issue?

MR. SALTA: Uh-huh. I mean, basically, the defense is putting the burden on us, which is an exceptional burden. This is a lot of work to -- I really don't know how long that would take or if it's even possible without us getting an expert. I don't know. I don't know the quality of the negatives. These

are some of them from the '30s. I mean --

THE COURT: Okay. I mean, it's a little bit surprising to me to hear you say that, Mr. Salta, because I mean, again, maybe this is just my lack of information about the universe of materials here, but how many negatives do you have?

MR. GALLAGHER: About 1400.

THE COURT: Okay. And how many -- how many photographs are there in the book?

MR. GALLAGHER: At least 2 or 300.

THE COURT: Two or 300.

MR. GALLAGHER: I think so. I don't remember offhand exactly what number they are, but --

THE COURT: That's fine.

MR. GALLAGHER: It's 200 pages, and some pages have lots of photographs because they are compilations, and some are single photographs, so I never really added up exactly how many are in the book. So --

THE COURT: The estimate is perfectly fine, Mr. Gallagher. Thank you.

And just in case we get this transcript transcribed at some point, that was Mr. Gallagher speaking.

And in terms of the collection, approximately?

MR. GALLAGHER: The collection?

THE COURT: What is defined here as "The Collection," which is the original and new Pilates photo collection.

MR. GALLAGHER: So that is about 2,000 because there's the pictures of Joe, but there's also pictures that I also put in there for a training manual that we took in '92.

THE COURT: Okay. So there are 1400 or so negatives, 200, 300 photographs in the book, and approximately 2,000 items in the collection, roughly?

MR. GALLAGHER: Yes.

THE COURT: Okay. And tell me -- that does seem like a heavy lift, Mr. Troy. I mean, tell me why it's important to know the answer to these questions.

MR. TROY: Your Honor, I hate to sound like a broken record.

THE COURT: No, but I'm asking you. I mean, I've heard everything you said, but again, you know, some of this is -- there are overlapping elements to all of this.

MR. TROY: We are trying to narrow down the universe because, as I've explained, Mr. Knull has shifted his position, and I'm not sure what position he is going to take either in a summary judgment situation or at trial as to how it is that the plaintiff claims ownership of all of these materials because what has happened is, is --

THE COURT: That's fine. Let me just stop you there.

I mean, is it possible, Mr. Salta, that the argument on the plaintiff's side at some point is going to be that with respect to some of these materials he has ownership of the

negative, and therefore, he possesses the copyright?

MR. SALTA: It's a further indication of it.

THE COURT: Okay. But that's going to be some basis --

MR. SALTA: It's not the --

THE COURT: It's not the only thing.

(Cross-talk)

MR. SALTA: -- be all and end all of proving copyright.

THE COURT: Right. But is he going to rely on the ownership of the negatives in part as the basis for legal arguments he is going to make in this case?

MR. SALTA: In part.

THE COURT: But so then why wouldn't the defendants be entitled to know which negatives he --

MR. SALTA: And they are.

(Cross-talk)

MR. SALTA: It begs the question of timing. I'm sorry.

THE COURT: No, no. I'm sorry. Just are you saying they are, it's just a question of when we should be able to do that and how to do it most efficiently?

MR. SALTA: Exactly. After the -- what we can do here insofar as fact discovery is concerned, they'll have an opportunity after January 31st to bring in their expert -- and

you will need an expert -- to determine these issues. We can't do it. It's just physically monumental at this point. And since they are bringing in an expert, anyway.

THE COURT: So, Mr. Troy, I mean, is the possession of the negative germane to any of the arguments you want to raise in your briefing?

MR. TROY: It is -- it is the plaintiff that has staked out the position that possession of the negatives is *ipso facto* ownership of the copyright.

THE COURT: You dispute that.

MR. TROY: I dispute that. Well --

THE COURT: But here is the question --

MR. TROY: -- I have the communications.

THE COURT: I mean, let me just stop for a second. Typically in discovery -- I mean, I made a reference earlier to there are cases where we defer expert discovery until after summary judgment because it would truly be a savings if the liability issue is resolved in favor of the defendant for the parties to avoid the burdens and expenses of expert discovery because some expert discovery purely relates to damages, and if there's no liability, there's obviously no damage discovery that needs to be done.

This seems like maybe we are getting back to a place where we should be within the more traditional approach to discovery, which is we do the expert discovery before summary

judgment. I mean, why not do that?

MR. SALTA: I agree.

MR. TROY: Well, Your Honor --

THE COURT: I know it's expensive, but why not do it? Then you will have -- you will also get a lot of information out of that, right? I mean --

MR. TROY: I'm sorry. I can't agree with you on that, and the reason for that is, is Mr. Gallagher is the one who keeps making these claims, plaintiff, that they own the negatives, and they have all of this treasure trove of information that hasn't seen the light of day and that, you know, they possess this, and because they process the negatives, then they possess the copyright. The expert isn't going to sit there and go through negative by negative and line it up with the Deposit Copy and say, oh, well, they're -- they have this negative, but they don't have this negative. They have this negative, but they don't have that negative. The expert is going to verify that, in fact, the negative that they possess, that they claim that the photograph was taken in 1942, that based upon the film, is more likely than not that that is an original photograph as opposed to a photograph that might have been taken in 1970.

So, you know, deferring the expert isn't going to solve this issue.

MR. SALTA: But if I may, if I recall last time,

counsel was ready to go himself and do it himself and look at the negatives, take pictures, et cetera. Okay. So maybe we can save money on the expert for later, if necessary, to verify the age of the negatives or whatever, but you can come -- subject to the protective order, of course -- and take those negatives, look at them, and compare them with what's in the book or whatever else.

THE COURT: So here, this is what makes this a little bit of an unusual discovery issue. In the ordinary course, the plaintiff, whoever is asking for the -- the defendants in this case asked for records. The records are produced, and then the requesting party reviews those records to see what, if anything, is useful about those records, right? That is a certain amount of burden on the plaintiff in this scenario to collect, review and produce the documents; and then a certain amount of burden on the defendants to sift through the documents that have been produced and figure out what's relevant, what's not, whether we care, whatever.

The challenge here is that this request shifts the entire burden of that document review and analysis to the plaintiff, which would be otherwise a shared burden to some extent because these negatives can't be produced in a traditional sense. The idea that the defendants would have to do some work to match up the negatives to the photographs is not totally dissimilar to the idea that you have to sift through all

of the documents to figure out the factual story and what's relevant to the presentation of the defense case.

So while I'm not particularly convinced, Mr. Salta, that this is an expert issue because I think Mr. Troy's point is right. I mean, the expert's job is not going to be to match up the photographs with the book. There is something to be said for somehow this being a shared enterprise to figure out what's what in terms of this collection. It is burdensome, but it's also, as I said earlier in the context of some of these other interrogatories, highly relevant.

So I'm not sure exactly what to do about that one, either. You folks have presented a lot of vexing questions here today, which is fine.

But I think, Mr. Troy, that, you know, the idea that you just shift this entire burden to them to do that matching process is a bit inconsistent with the way discovery typically works.

At the same time, Mr. Salta, it doesn't exactly work to shift the burden all to the defendants because, again, in the ordinary course of reviewing and producing documents, there is some burden on the producing party as well to sift through what's relevant and what isn't.

MR. SALTA: We'll produce -- way back we were thinking of going to a location where Mr. Troy would have a light table and take pictures of the negatives, and we'll produce -- we'll

produce all the documents.

THE COURT: Is that helpful to you, Mr. Troy? I mean, all --

(Cross-talk)

MR. TROY: Your Honor, as you pointed out very aptly in the last hearing, it makes me a witness, and seeing that I am the attorney, I don't think that that should be done. I think the compromise position would be -- hold on.

THE COURT: You don't have to be the person to do it. I mean, you can --

(Cross-talk)

MR. TROY: Who am I going to get to do it?

THE COURT: I don't know. Your expert maybe.

MR. TROY: Right. But now I'm flying my expert in from California. It's going to cost an absolute fortune. This is a small client. This -- you know, this litigation has been hugely expensive given all of the circles that we have been chasing around and, you know, I know that the Court in one sense is sympathetic to it, but in the same sense, you know, we have to litigate. I have --

THE COURT: Hold on. Let's just be clear about that. The case is big and sprawling because you've made it big and sprawling. Now, there is good reason for that, and we've talked about the efficiencies of that, but the case that was filed by plaintiff was fairly narrow. You, in counterclaiming in the way

that you have, which is your right, have made it big and sprawling. So you can't really do that, ask for more expansive discovery and then complain about it being burdensome. That -- you can't have it both ways.

MR. TROY: I understand that, but, you know, as -- in our papers plaintiff sued over 200 images when, in fact, the plaintiff had taken down 25 images.

THE COURT: Okay.

(Cross-talk)

MR. TROY: So --

THE COURT: -- about 50 images instead of 2,000 images, and I imagine Mr. Salta and Mr. Gallagher would be happy to review the 50.

MR. TROY: May I suggest as a potential to at least get the factual part of this done is is that a third party is engaged as a duplication company because there are -- you know, companies that duplicate negatives or will make positives out of them because part of the problem, as Your Honor saw in what we filed was the Deposit Copies, much of it is just a black dot. I mean, you don't know what's even on the page. Is to have a third-party company make images of, you know, the negatives that plaintiff claims and that plaintiff will represent these are the negatives that I received, you know, in 1992 because that's really what we are talking about here, and that way we would both have a complete set of copies of what should have been in

the original Deposit Copy. Had the Deposit Copy been done correctly, as opposed to these black images, we wouldn't be in this issue.

THE COURT: Okay. And the point of having it be a third party is -- I assume the next part of that was to share the cost of it?

MR. TROY: Well, I'm trying to -- Your Honor, I'm trying to think on my feet, even though I'm sitting down, of a way to kind of break through this logjam without going to the need of experts then later at some point in time inspect the negatives to verify the negatives are, in fact, as old as they are because I'm hoping, as I said earlier, to avoid that assuming that we prevail on our motion for summary judgment.

THE COURT: And if you were able to get the third-party vendor to make these copies, which would then be subject to the protective order, of course, as well --

MR. TROY: Of course.

THE COURT: -- you would then be able to review them yourself to determine which of those images or negatives or reproductions match up with the items in the book and the collection? In other words, Interrogatory No. 6 and number seven?

MR. TROY: My staff, I mean, the royal "you." Although, my staff isn't lined up out the back door here.

THE COURT: No, I understand. But "you" meaning

defendants collectively.

MR. TROY: Yes. And I think that plaintiff would also benefit from that as well.

THE COURT: All right. Mr. Gallagher seems not happy with that suggestion.

MR. SALTA: You know what, I defer -- I always defer to the client. Mr. Gallagher says that he can answer these questions, so maybe we can do it without -- we can wait until after January 31st if an expert is necessary.

THE COURT: Okay. Fine. That's the answer, then. I mean, they are going to be verified interrogatory responses, which means that they will be under the penalty of perjury. It's not a best guess. It is going to be a process to review all of that stuff.

Okay. Well, again, this is partly -- and we had a very lengthy proceeding here today in part because we basically met-and-conferred our way through half of these objections and such, but hopefully that was productive for everybody.

And there may be other specific interrogatories that I haven't addressed in detail, but to the extent that my guidance on all of these issues doesn't answer your questions for those, you should talk to each other about it and figure out if there is a workable solution. I am all in favor of practical solutions to these problems and, you know, this case does present a number of unusual circumstances, and you're working

through how to get these questions answered, and you understand that those are going to need to be answered in one way, shape or form.

So look, again, we have just under two months here based on the current schedule to complete discovery. Aside from all of this paper, written discovery, which is not nearly complete, we have the deposition of Mr. Steel, which we've talked about. What other depositions are you anticipating? I'm guessing Mr. Gallagher. I should just stop guessing. My guessing has not been very good today.

Mr. Troy, who do you anticipate deposing in this case?

MR. TROY: We have one other deposition scheduled, which is of Mr. Kaylo (ph), who was the attorney that represented Mr. Hom/Healite in the transaction where Mr. Gallagher purchased what he purchased. I haven't argued with Mr. Salta today about what he says is in that agreement because that's not what we are here for today. But anyhow, he is scheduled to be deposed. Originally, it was supposed to be Friday, but they rescheduled it; "they" meaning him and his attorney for next Friday in New York in his attorney's offices.

THE COURT: Okay.

MR. TROY: At the moment, I have no other depositions scheduled. I was actually hoping because we thought that the more efficient vehicle were -- was written discovery in this case, to not take Mr. Gallagher's deposition, and as

Mr. Gallagher probably remembers all too well is that in the 2000 case we took a huge number of depositions, including of him; and I was just trying to avoid that, not that I don't mind sitting in the same room with him, but I just don't think that it's a productive use seeing -- of our time given some of the issues that need to be identified, which is what we've been discussing for the last couple of hours.

THE COURT: Okay. So fair enough. And that, obviously, will depend on the outcome of your negotiations about the scope of the written responses, and maybe the plaintiff's side would prefer to just have Mr. Gallagher sit for a deposition. Who knows? But I understand your position.

So other than Mr. Steel and Mr. Kaylo, you don't -- at the present moment don't anticipate any further depositions?

MR. TROY: Correct, Your Honor.

THE COURT: Okay. And look, discovery is still ongoing, so that's without prejudice to your being able to change your mind as you learn more. And of course, I understand that you may need to depose Mr. Gallagher for all the reasons we talked about today.

Mr. Salta, depositions?

MR. SALTA: At this point, I don't think we have anything in mind or scheduled.

THE COURT: Okay. You are not going to need to depose Ms. Kelly or a corporate representative of True Pilates Boston?

MR. SALTA: I will confirm with Mr. Knull. To be honest, I don't anticipate it, no.

THE COURT: Okay. All right. Well, that simplifies things a little bit.

And can you talk about a briefing schedule with Judge Karas or are you supposed to report back to him after discovery is complete?

MR. TROY: First, I think we are supposed to report back to him after today.

THE COURT: Okay. After today?

MR. TROY: After -- Judge Karas was adamant that we needed to be nice to you.

THE COURT: Nice to me?

MR. TROY: Yes. To which I said, I'm always nice, but the -- we're supposed to report back to him about today, and then at the close of factual discovery at the end of January, we are supposed to -- he didn't really want us to resubmit, I think he just wanted us to reengage the pre-motion process.

THE COURT: Okay. That's fine. And you've already written those letters, but it may be that the way this is happening now, your -- whatever motions for summary judgment you intend to file can be comprehensive instead of partial. But I'm not -- or maybe there is -- you know what? I'm not going to wade into that. We can talk about that another time.

MR. TROY: If you don't mind my asking, Your Honor, if

I could just -- on that point, and I have tried to be really, really careful in my papers; it's partial only insofar as our first counterclaim which are for damages related to the unlawful takedowns, but we're not at that stage until I demonstrate that there is no copyright. So, you know, under the copyright statute Section 512(f), the -- we are entitled to damages and attorneys' fees and costs should we prevail. So that's the only little piece that would be left over should we prevail on our motion for summary judgment. So that's the reason why I've termed it "partial" because there is that one little piece that's left.

THE COURT: Okay. Okay. The short answer is that you don't have a briefing schedule, so that's fine.

MR. TROY: Sorry.

THE COURT: No, that's okay. It's all helpful to understand all of that. So I'm just trying to think about when we should next get together, in part so I set some parameters and get you to make sure you get everything together and finalized sufficiently in advance of January 31st so that if we have disputes that need to be adjudicated, you can present those to me. I'm not sure -- you know, at that point I'm not sure whether we need to have another lengthy conference to address all of these things because we've now worked through all of the guidance that I think I can give you with respect to the scope of the responses and what needs to be done at that point and may

be something that I can simply address on papers, and it may make sense to submit slightly more comprehensive papers if there are disputes outstanding. I'm hopeful that there won't be, but who knows?

So I want to give you a little bit of time to digest everything we have talked about today. Meet and confer with each other, and then potentially propound revised versions of document demand -- I mean, RFAs if necessary, which probably will be necessary, interrogatories, depending on how you choose to resolve that. I think it makes sense to try to bring that all to a head by the end of next week, the 16th, because that way if you get any revised written discovery served by the 16th, you will have until mid January to respond, and then you can provide me with an update about that shortly before the scheduled completion of discovery. So I think that that's how we'll go about it. Any revised discovery demands in whatever form, whether that's RFAs, interrogatories, document demands, to be served by next Friday, the 16th. I will put the response date at the 17th of January given the holiday that weekend. You will have a chance to review and digest whatever comes of that, and I will ask you to provide updates to me by the 23rd of January.

So I mean, as we sit here, there are no outstanding issues in discovery from the plaintiff's perspective, right, Mr. Salta?

MR. SALTA: Not that I know of, Judge.

THE COURT: Okay. So we will make it this way: The 23rd of January either side can submit a letter regarding ongoing affirmative discovery disputes that have not been resolved by the supplemental responses to supplemental demands or amended responses to amended demands. Those should come in on the 23rd; responses to those letters by the 26th. I realize that that puts us up against the January 31st deadline. I don't really see any way of shortening that. I mean, we could require your supplemental or amended response demands to be served by this Friday and shorten the whole thing by a week, but realistically, I'd rather give you a little bit more time to work through the issues and see how many of them you can resolve on your own. I also am going to be in the midst of a whole series of trials in January, so it's not as though getting your letters on the week of the 17th is going to make a material difference to me. My hope is that giving you this extra week in December to meet and confer will make a material difference to you in terms of the scope of what you are able to address and work out independently. So letters on the 23rd, responses on the 26th. And we will take stock of where we are at that point and whether we need a new conference.

I'll just point out that January 31st deadline is Judge Karas's deadline. I think I mentioned this at our first conference. Judge Karas's scheduling order, even though this

matter is referred for general pretrial supervision, his scheduling order requires that if you need an extension of the discovery deadline, you have to request it from him, which you've done before. So I will also give Judge Karas a report on today's conference and let him know what to expect. I'm optimistic that we will be able to get everything done by the 31st. If there needed to be a brief extension of that deadline, you would have to ask Judge Karas for it, but I'm reasonably optimistic that he would be willing to grant that as well if it comes to that.

Okay. Is there anything further that we should address today, then, from the plaintiff's perspective, Mr. Salta?

MR. SALTA: No, I don't think so, Judge.

THE COURT: Mr. Troy?

MR. TROY: The only question I have outstanding as between Your Honor and Judge Karas because he had asked us to report back to him after today.

THE COURT: Yes.

MR. TROY: And one of the outstanding issues, but I did not want to bother the Court, was the discussion we had about the expert discovery going later, and you know, you said you are going to update Judge Karas as to what transpired today and then should we not? So --

THE COURT: No. If he told you to update him, you

should update him. I'm just going to send him an email. If he asked you to send him a letter to update him on what happened today, you should do that. I mean, I think the upshot of what happened today -- and you can describe it however you want -- is that I attempted to give you guidance on a number of these outstanding issues, and you are going to meet and confer about them over the next ten days and revise discovery requests as appropriate all with an eye towards getting discovery done by January 31st as planned. But I think where we left things in terms of the experts is you have discussed it with Judge Karas, the possibility of doing discovery post -- expert discovery post briefing, and nothing that has been said today, despite all the back-and-forth, has really changed that.

I think Mr. Gallagher is prepared to answer certain things that took us away from the potential for expert discovery in connection with 6 and 7. You know, again, my understanding of the scope of what the expert would be doing is that that -- some of that could be deferred until afterwards. I think a lot of the issues that are outstanding are really fact questions that are not going to be answered by the expert Mr. Troy is proposing to bring in.

So, you know, I know we have gone around and around on that a bit today, but nothing that you have said or that we have discussed makes me think that we should really reframe or rework the schedule so that we do expert discovery before January 31st.

That said, you are going to meet and confer over the next ten days, and if you wind up having a joint proposal to do things differently because you conclude -- I'm not thinking this is likely since you have very different views on this -- but there may be creative ways of trying to bridge the divide. I think if you decided that you wanted to try to do expert discovery, you could report that to me and/or to Judge Karas at some point between now and the 16th or between now and the holidays and the discovery schedule could be adjusted.

Again, I think this is a situation where if the parties wind up having -- the discovery here is just a bit unusual for a variety of reasons because of the scope of the number of issues in dispute or the number of works that are potentially at play here, and also the fact that the defendants are trying to shoehorn as much of this as possible into written discovery, in part to obviate the need for depositions. So, you know, there are a lot of different things going on here that are not typical of a discovery schedule that we all use for every case, and so this may be one where if the parties have a creative proposal, especially if it's a joint proposal, for how to do things a little bit differently, I certainly would be amenable to adopting that, and I would certainly be willing to recommend that to Judge Karas, assuming that I think it's a good idea. And you know, I think if there is something like that in the offing, you will let me know. Okay?

I'm not going to set another conference date, not because I wouldn't like to see you all again, but we will hold off on that until we see whether that's necessary. I'll report back to you with an order of some sort after I get those letters the week of the 23rd, and if we need to have a further conference, we will get that on the calendar.

Just in case that that means we wind up not having any further conferences in the case, let me just mention that to the extent you all think there is any way that I could help you resolve this case through a settlement conference, you should let me know. You don't have to go back to Judge Karas to ask for a further order of reference for settlement. I don't really see that being likely here because of the particular issues involved and all of the things we have been talking about, but I always want to mention that before I bid you farewell.

Again, don't tell me you want a settlement conference just because you want me to think you are reasonable people. I already think you are reasonable people. I just offer that in case you think there would be any meaningful opportunity to try to get things resolved or even get some things resolved. We could have a settlement conference to work through those issues. So talk about that as well.

Again, I'm not sure I see the path forward for a settlement conference at this point, but that offer remains open, you know, throughout, whether it's before briefing, while

the briefing is pending, or if the case survives summary judgment in some form before trial. Different cases can settle at different times, and the parties' views on settlement will evolve as the issues are narrowed and brought into clearer focus. So keep that in mind, and keep me posted if that's something you would like to consider.

All right. So with that said, we will stand adjourned for today. Thank you for bearing with us through all of this. I think we accomplished a lot. I hope we did. I wish you all a safe, happy and healthy holiday season. Happy new year. And if we don't see each other again, I will look forward to seeing you on other cases in the future. Take care, everybody.

MR. SALTA: Thank you, Judge.

MR. TROY: Thank you, Your Honor.

THE COURT: Thank you.

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